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In The SUPREME COURT OF THE UNITED STATES

October Term, 1999

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Petitioner,

versus

RICHARD PFEIL; MARY JO PFEIL,

Respondents.

JOAN GODLOVE; TODD ALEXANDER,

Petitioners,

and

SONA JOHNSTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the "good cause" requirement of Rule 26(c) can be satisfied by conclusory arguments of counsel, rather than an evidentiary showing, and, if not, whether a protective order based solely on such arguments violates the First Amendment rights of the discovering party when it restricts that party's use of discovered information and documents and places it under seal.

Whether the exercise of this Court's supervisory powers is called for where the appellate court affirmed a Rule 37(a)(4) sanctions order in the face of clear and convincing evidence that that order had been procured by fraud and thereby sanctioned a radical departure from the accepted and usual course of judicial proceedings.

Whether terms set out in italics below are implicit in Rule 40(a)(2) of the Federal Rules of Appellate Procedure and, if so, whether an appellate court may summarily deny a petition for rehearing that makes the *prima facie* showing prescribed by that rule without violating the petitioner's right to due process of law under the Fifth Amendment:

> The petition must state with particularity each *holding that conflicts with a controlling statute, procedural rule or decision,* point of law *decisive of the case and duly submitted by counsel,* or *material* fact that the petitioner believes the court has overlooked or misapprehended.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Hutchinson v. Pfeil*, No. 98-5043, 1999 U.S. App. LEXIS 29523, is not reported (App. A at 1a). Nor are orders of the district judge in *Hutchinson v. Pfeil*, No. 92-C-1088-E (N.D. Okla. Feb. 18, 1998, Aug. 26, 1993, April 13, 1994, and Oct. 19, 1994) (App. B at 13a, D at 23a, G at 43a and H at 45a), or the magistrate (Dec. 22, 1993, Dec. 30, 1994, and April 21, 1995) (App. F at 30a, I at 47a, and K at 56a).

STATEMENT OF JURISDICTION

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered November 9, 1999. The panel denied a timely-filed petition for rehearing January 4, 2000 (App. L at 58a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a) (1993).

CONSTITUTIONAL PROVISIONS, STATUTE AND PROCEDURAL RULES INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Fifth Amendment to the Constitution of the United States provides in relevant part: "nor shall any person . . . be deprived of life, liberty or property without due process of law."

28 U.S.C. § 636(b)(1)(A) (1993)

Fed. R. App. P. 40(a)(2)

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STATEMENT OF THE CASE

Questions presented by this petition arise from a case pitting "David" -- Thomas R. Hutchinson, an ordinary citizen represented by attorneys who are sole practitioners, against four "Goliaths" -- Richard Pfeil and Mary Jo Pfeil, owners of a $30 million art collection, the Baltimore Museum of Art, and curator Sona Johnston, each of whom is and has been represented by attorneys associated with large, politically influential firms.

Petitioner Thomas R. Hutchinson invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) when he filed an action for partition of "Summer Hillside," a painting by Theodore Robinson to which his father's estate claimed an undivided one-third interest by descent.[1] He was a citizen of Washington and personal representative of the Estate of Robert W. Hutchinson, deceased; defendants-respondents Richard Pfeil and Mary Jo Pfeil were citizens of Florida. The jurisdictional amount, exclusive of interest and costs, exceeded $50,000.

Discovery orders appealed post-judgment were entered by the magistrate judge in December 1993 and April 1995 and made the subject of timely-filed objections. The first was an

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[1] Although the Pfeils abandoned their adverse possession defense, the district court granted their motion for summary judgment on grounds that Hutchinson's partition action was barred by laches and limitations. The Tenth Circuit affirmed the judgment on laches grounds only and remanded the case so the district court could rule on Hutchinson's objections to a magistrate's orders imposing Rule 37(a)(4) sanctions against him and two of his attorneys and denying his motion to modify a 1994 protective order. *See Hutchinson v. Pfeil*, 105 F.3d 562, 565-66 (10th Cir.), *cert. denied*, 522 U.S. 914 (1997).

order imposing Rule 37(a)(4) sanctions against Hutchinson and two of his attorneys. The second was an order refusing to lift a 1994 protective order covering the deposition of nonparty Sona Johnston and documents produced in response to a subpoena *duces tecum* and placing the deposition and related documents, including papers filed in support of and in opposition to cross-motions for summary judgment, under seal. Both orders were affirmed by the district judge in February 1998.

Other orders announced by the magistrate on August 11, 1993 -- rulings denying Hutchinson's motions to compel complete and unevasive answers to certain interrogatories and document requests and to determine the sufficiency of the Pfeils' responses to his requests for admission -- could not be made the subject of Rule 72(a) objections Hutchinson and his counsel wished to file because neither was committed to writing and entered into the record. Nor could those rulings, which served as the basis for the sanctions order, be reviewed on appeal. *See Hutchinson v. Pfeil*, 105 F.3d at 566 (properly-filed objections resolved by the district court are a prerequisite to this court's review of a magistrate judge's order under § 636(b)(1)(A)).

Order restricting use of information and documents obtained from Sona Johnston pursuant to subpoena.

Six days before Sona Johnston's deposition was to be taken, pursuant to subpoena, the magistrate denied her motion to quash, in part, and entered a protective order which provides:

> Recognizing the legitimate proprietary interests of Ms. Johnson with respect to her scholarship and research, the court hereby enters a protective order restricting the use and dissemination of any documents or information obtained by Plaintiffs from Ms. Johnson or her employer, the Baltimore Museum of Art. Documents, materials, photographs, or information obtained by virtue of the deposition of Ms.

> Johnston in this case, or the subpoena served upon the Baltimore Museum of Art in this case are to be used only in conjunction with this case, and are not to be further disseminated, quoted, cited or otherwise used for any other purpose whatsoever, without an order of this court specifically authorizing such further dissemination or use. (App. I at 48a).

This order was based soley on the arguments of counsel. No affidavit was filed to support claims that Johnston was a scholar, that information Hutchinson sought was confidential or otherwise subject to protection under Rule 26(c)(7), and that disclosure of that information would damage Johnston's career.

Nor was proof offered, during Johnston's deposition, of the alleged confidentiality of anything she said or any document she or the museum produced. The only thing that could damage Johnston's career or affect her reputation as the author of what the Pfeils characterize as one of two "standard works" on Theodore Robinson is the fact that representations she had made in the past about the provenances of a number of Robinson paintings are based on speculation and conjecture, not fact.

When Hutchinson filed his motion to lift the 1994 order, he argued that none of the information obtained from Johnston was entitled to protection under Rule 26(c)(7) and that she had failed to make the "good cause" showing mandated by that rule. Although counsel argued that Hutchinson was using discovery to steal Johnston's research, the deposition transcript establishes that her expressed concerns are unfounded. The stated reason for the magistrate's denial of Hutchinson's motion was that he did not carry his "burden to show some legitimate purpose or reason to lift the [1994] protective order." (App.J at 52a, 54a).

Relying again on arguments of counsel, the magistrate granted Johnston's oral motion to place transcripts of her depo-

sitions, admitted into evidence during the hearing on Hutchinson's motion, and excerpts filed to support or oppose dispositive motions, under seal. Before taking that action, he did not consider "[t]he importance of the material to the adjudication, the damage disclosure might cause, and the public interest in such materials." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983).

When the district judge reviewed Hutchinson's objections, he disagreed with the magistrate judge on one point. He conceded that Hutchinson was not required to show a legitimate reason to lift the order. "[T]he burden of proof justifying the need for the protective order remains on the initial movant (Ms. Johnston), while the burden on the opposing party is to raise the issue of confidentiality . . . ." (App. B at 15a).

The Article III judge also recognized that the standard for issuing protective orders under Rule 26(c) is "good cause shown." (App. B at 15a). Instead of finding that there was no rational basis in the evidence to support the 1995 protective order and that it, like the 1994 order, had been entered without the required "good cause" showing, *i.e.*, that the challenged order was "clearly erroneous" and "contrary to law," 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ.P. 72(a), he affirmed the order of the magistrate judge. In doing so, the district judge

> specifically notes [the] propriety [of the protective order] and shares the concern of the Magistrate Judge over the dissemination of Johnston's research and opinions. The Court is further convinced that uncontrolled dissemination of Johnston's research would be harmful to Johnston and to her career. (App. B at 15a-16a).

The evidentiary basis for the "shared" concern of the district judge and the magistrate judge remains a mystery. In the case of the magistrate judge, it cannot be the transcripts of

or exhibits to Johnston's deposition because he made it clear, during the 1995 hearing, that he had no intention of reviewing them. (App. J at 52a). Nothing in the order of the district judge order suggests or confirms that the deposition itself gave rise to his concern. (App. B at 13a-16a).

Tenth Circuit precedent, cited in the panel's opinion, holds that to resist discovery under Rule 26(c)(7), a person must first establish that the information sought constitutes confidential research, development, or commercial information and then demonstrate that its disclosure might be harmful." *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981) (App. A at 11a).

Without commenting on or attempting to discern what the *Centurion* panel meant when it used the verbs "establish" and "demonstrate," the panel rejected Hutchinson's arguments that the 1995 protective/sealing order was "clearly erroneous" because it was based solely on the conclusory arguments of Johnston's counsel and "contrary to law," *i.e.*, Supreme Court precedent Hutchinson cited as supporting authority:

> As support, Plaintiff cites *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In *Seattle Times*, the Supreme Court held that a protective order entered pursuant to a state law patterned after Rule 26(c) does not offend the First Amendment. *Id.* at 37. *Seattle Times* does not address the showing required to establish good cause. On the contrary, the Supreme Court noted that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Id.* at 36.
>
> Plaintiff asks this Court, essentially, to hold that good cause cannot, as a matter of law, be estab-

> lished on the basis of arguments made by counsel alone. We decline to do so, finding such a holding to be inconsistent with the broad discretion afforded trial judges under the rule. In other words, the fact that good cause for the protective order was established solely on the basis of arguments made by counsel does not by itself compel the conclusion that the magistrate judge abused his discretion in refusing to lift the protective order. (App. A at 11a).

Having found that *Seattle Times* undermined, rather than supported Hutchinson's position, the panel affirmed the order which overruled Hutchinson's objections to the magistrate's 1995 protective/sealing order. (App. A at 12a).

Order imposing sanctions against Hutchinson and two of his attorneys under Rule 37(a)(4).

"Summer Hillside," the subject of Hutchinson's partition action, was displayed at the Philbrook Museum of Art in Tulsa, Oklahoma for a ten week period during the fall of 1992, in an exhibit titled "Masterworks of American Impressionism from the Pfeil Collection." This fact was central to his jurisdictional allegation that the Pfeils had purposefully availed themselves of the privilege of conducting activities within the forum state.

After their Rule 12(b)(2) motion to dismiss was filed, the Pfeils were asked to provide information relevant to their jurisdictional defense. Interrogatories 3 and 4 asked them to "[d]escribe in detail any contacts, ties or relationships [which they, Paul Swisher, and Art Services International ["ASI"]][2]

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[2] ASI was a party to contracts signed by the Pfeils regarding exhibition of the collection and preparation of an elaborate catalogue; it arranged for the collection to be exhibited at the Philbrook and ten other museums. The Pfeils' assertion that ASI was not their agent ignores Oklahoma law and constitutes a false representation of fact.

have had with Oklahoma or any of its individual or corporate residents before, during or after exhibition of the Pfeil Collection at the Philbrook while acting as [their] "agent," as that term is defined by the court in Curtis v. CIA Machinery, Inc.,[3] 571 P.2d 862 (Okla. App. 1977)."

The Pfeils' answer to Interrogatory 3 was complete and unevasive. It stated that they "have had no 'contacts, ties or relationships' 'with Oklahoma or its individuals or corporate residents before, during or after exhibition of the Pfeil Collection at the Philbrook.'" Their answer to Interrogatory 4 was not:

> None of the persons listed in Interrogatory No. 4 is or at any relevant time was an agent of the defendants, with the exception of Paul Swisher . . . . The only "contacts, ties or relationships" that Mr. Swisher had with Oklahoma before, during or after exhibition of the Pfeil Collection was a visit to the Philbrook during the exhibition on September 26, 1992, and telephone calls related thereto.

Although ASI was one of the "persons listed in Interrogatory No. 4," no mention is made of at least twenty-eight

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[3] The following language from *Curtis*, a case in which the Oklahoma court rejected a similar jurisdictional defense, was quoted in a footnote to Interrogatory 4:

> An "agency" relationship may arise under certain circumstances even where the parties may not have intended to create one. In its essential nature the relationship results from the express or implied consent of one person for another to act on his behalf with regard to some transaction, and if the latter performs the contemplated act he does so as the agent of the former regardless of what he is called.

contacts[4] ASI had with the Philbrook between 1989 and 1992 in the Pfeils' answer to that interrogatory. The same can be said of their "revised" answer to Interrogatory 4.

Document Request 10 also sought information about contacts the Pfeils' agents had with the forum. Although the Pfeils' written response stated that they would produce documents that relate to any contact, tie, or relationship Swisher had with the state while acting on their behalf, the only document produced was a credit card statement reflecting a charge for his stay at a Tulsa hotel on September 26, 1992. The Pfeils and their lawyers concealed the fact that Swisher attended the Fall Gala at the Philbrook on **September 25,** 1992, by identifying a newspaper article[5] containing that information as being responsive to Requests 2-4, not Document Request 10.

In their initial response to Document Request 10, the Pfeils objected to producing documents that would establish contacts ASI had with the forum on grounds that ASI had never acted as their agent. In their "revised" response, however, "defendants state[d] that they have already produced all documents that relate to any contact, tie or relationship between ASI . . . and the State of Oklahoma or its individual residents before, during or after the exhibition of the Pfeil Collection at the Philbrook." This, like the Pfeils' sworn statements that Swisher's

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[4] The Pfeils produced copies of the ASI-Philbrook contract and one letter ASI sent to the Philbrook. The Pfeils and their lawyers concealed the fact that there had been at least twenty six other ASI-Philbrook "contacts" between 1989 and 1992. This information surfaced in 1995, when the Philbrook complied with a subpoena issued in Hutchinson's second case against the Pfeils. Documents produced by the Philbrook are not part of the record in this case, but their existence cannot be disputed by the Pfeils or their lawyers.

[5] One of the lawyers sanctioned for filing Hutchinson's motion to compel "discovered" this article in April 1994.

"only" contact[6] with the forum was his visit to the Philbrook on September 26, 1992, is a blatant lie. *See* footnote 4, *supra.*

Because the Pfeils denied that they had purposefully availed themselves of the privilege of conducting activities within Oklahoma and argued that "the activities here involved were not 'commercial,'" Hutchinson asked them to describe "purposes, objectives and goals" to be furthered by exhibition of their collection and preparation, distribution, and sale of the exhibition catalogue. Rather than provide this information, which was sought by Interrogatories 8, 9, and 10 and Document Requests 14 and 15, the Pfeils objected on relevancy grounds.

When the Pfeils were asked to admit that they purposefully availed themselves of the privilege of conducting activities in Oklahoma through forum-related conduct of ASI, and thereby invoked the benefits and protection of its laws, they objected on

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[6] During the four or five hours Swisher was at the Philbrook on **September 25,** 1992, he talked with a number of people about the Pfeil Collection. Making introductions during this black-tie event was Philbrook curator Richard Townsend. Both were assigned to a table with three museum patrons, one of whom had donated money to build the new auditorium. None of this information was disclosed before the trial court rejected the Pfeils' jurisdictional defense. Its order, like the jurisdictional allegation in Hutchinson's complaint, only refers to "the Tulsa exhibit." (App. G at 43a).

Having raised the issue of personal jurisdiction, the Pfeils did not have the option of blocking Hutchinson's efforts to meet his burden of proof on that issue. *See Insurance Corp. of Ireland v. Compagnie des Bauxites des Guinee,* 456 U.S. 694, 709 (1982). That, however, is what the Pfeils and their lawyers did, with the unwitting assistance of the magistrate who not only denied Hutchinson's discovery motions (App. C at 21a), then failed to commit his oral rulings to writing so they could be appealed, but also entered an order imposing Rule 37(a)(4) sanctions against Hutchinson and his counsel and prohibiting them from filing any papers until after the district court ruled on the Pfeils' motion to dismiss. (App. C at 38a-39a, 41a-42a).

grounds that Request 18 "asserts legal conclusions . . . which are not the proper subject of requests for admission."

After Hutchinson filed motions to compel answers to certain interrogatories and a more complete document production and determine the sufficiency of certain Rule 36 responses, his lawyers were attacked for focusing on the Pfeils' initial responses rather than "revised" responses served three weeks later. This attack was coupled with an argument designed to persuade the magistrate judge that Hutchinson's motions should be summarily denied because they "[s]eek an order requiring the defendants to respond to discovery requests to which they have already responded."

Defense counsel also made misrepresentations of fact about the completeness and accuracy of the Pfeils' discovery responses. Some were written; others were made during the August 11, 1993 hearing on Hutchinson's motions:

> The defendants have fully responded to those interrogatories and requests for production that seek information about the defendants' contacts with Oklahoma . . . . No further discovery should be permitted the plaintiff before the Court rules on the pending Motion to Dismiss.
>
> We realize there may be a dispute as to whether the sufficiency of the contacts within Oklahoma arise to the level of granting jurisdiction to this court. . . . But what those contacts are is no mystery and we have fully and completely responded to the requests that relate to contacts with Oklahoma.
>
> [W]e have disclosed and responded to all interrogatories, . . . and document requests that in any way relate to the Pfeils' contacts with Okla-

> homa, their admitted agents, Mr. Swisher, and counsel contact with Oklahoma and have produced the related documents . . . .
>
> [T]he defendants have disclosed all the information, have responded to all of the interrogatories . . . that have anything to do with the Oklahoma contacts.
>
> [D]efense counsel have accurately set forth the limited contacts with the State of Oklahoma . . .

Immediately after hearing the arguments of counsel and apparently accepting defense counsel's representations as true, the magistrate judge denied Hutchinson's discovery motions, then announced that he was imposing Rule 37(a)(4) sanctions against Hutchinson and his counsel. (App. C at 21a-22a).

The district judge authorized the magistrate to consider and decide the "due process" issues of lack of prior notice and opportunity to be heard, raised by the motion to reconsider filed by Hutchinson and his counsel, when he extended the time for them to respond to the Pfeils' fee application[7] to a date ten days after any adverse ruling on their motion. (App. D at 24a).

The magistrate judge granted the motion to reconsider (but not that part of the motion which sought an order vacating

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[7] On April 13, 1994, almost four months after the order imposing Rule 37(a)(4) sanctions against Hutchinson and his counsel was entered on the docket, the district court "referred" the Pfeils' fee application to the magistrate judge. (App. G at 43a). *But see* Fed. R. Civ. P. 72(a) ("A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party *is referred* to hear and determine . . . .") (emphasis added); 636 U.S.C. § 636(b)(1)(A) ("a judge may *designate* a magistrate to hear and determine any pretrial matter pending before the court . . . .") (emphasis added).

the sanctions ruling on "due process" grounds) on September 3, 1993, and scheduled a hearing for October 13, 1993. (App. F at 33a). When Hutchinson's counsel learned that he would not hear arguments on the "due process" issues, but had decided, on his own motion, to hear arguments on "the pertinent questions of whether the making of the discovery motions was substantially justified or whether other circumstances made an award of expenses unjust," she sought and was granted a continuance to December 16, 1993. (App. F at 33a).

In the interim, counsel were notified that the magistrate would hear arguments on December 16, 1993, on the Pfeils' motion to dismiss and Plaintiff's Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not Be Disqualified for Making False Statements of Law and Fact to the Court. Because neither motion had been "referred" to the magistrate, Hutchinson sought relief from the district judge. (App. F at 35a). Hutchinson's actions in this regard were characterized by the magistrate judge as "a 'scorched earth' briefing campaign that inundated the court with shrill essays designed to rankle the opposition and constern the court." (App. F at 34a).

Still unaware of the fact that the Pfeils' lawyers had made material misrepresentations of fact[8] and that relevant

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[8] The extent to which the magistrate was fooled by arguments of counsel is demonstrated by the following excerpt from his order:

> The court concludes that the allegations against defendants' lawyers by plaintiff's counsel are spurious and unwarranted. Plaintiff's counsel has been fervid in her slanted representations to the court and the awarding of sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 may be appropriate. (App. F at 40a).

evidence had been concealed, the magistrate judge found that Hutchinson's discovery motions were not substantially justified. (App. F at 38a). He then entered an order imposing sanctions against Hutchinson and his counsel under Rule 37(a)(4) in the amount of $7,414.77. (App. F at 38a-39a).

Pertinent conclusions in the district court's order affirming the magistrate's sanctions order are quoted below:

> [T]he assertion that the Magistrate "failed to exercise jurisdiction delegated to him and exceeded that granted him" is without merit. A review of the record reveals that the actions of the Magistrate Judge, and the issues that he ruled upon were well within his authority and consistent with the Orders of the District Court.
>
> [T]he Court concludes that the Magistrate Judge's opinions that the Motion to Compel was not substantially justified is not clearly erroneous or contrary to law. The Magistrate Judge

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The panel that decided Hutchinson's appeal on the merits was also fooled by arguments of counsel when it overlooked evidence Hutchinson cited and made the following remarks after affirming the magistrate's order denying his "unreferred" Show Cause Motion:

> Defendants' counsel did no more than what they are entitled and required to do -- zealously represent their clients by advancing arguments and factual interpretations favorable to their clients. *E.g.*, Okla. Rules of Prof. Conduct, preamble at 962 (West 1996). The record contains no evidence that Defendants' counsel at any time lied to the court or committed any other violation of the rules of professional conduct.

Hutchinson v. Pfeil, 105 F.3d at 565.

> concluded that many of the requests were irrelevant, outside the limited scope of discovery, and that some arguments raised in the discovery motions concerned material that had been provided by the defendants. (App. B at 17a).

Hutchinson's lawyer's "discovery" of information about Swisher's attending the Fall Gala at the Philbrook **September 25,** and the fact that the newspaper article containing that information had been concealed "by trick" were disclosed to the district court in April 1994. The district judge made no mention of either fact in his February 1998 order. (App. B at 16a-17a).

The following misrepresentations of fact designed to conceal discovery misconduct from the Tenth Circuit and avoid the risk of reversal on appeal were made by the Pfeils' lawyer:

> Plaintiff has repeatedly argued to the Magistrate Judge, the District Court Judge, and now to this Court that Defendants materially misrepresented the facts because they stated that Paul Swisher visited Tulsa on September 26, 1992, instead of September 25, 1992, the date of the opening gala for the exhibition of the Pfeil Collection at the Philbrook. Both the Magistrate Judge and the District Court Judge recognized this error to be an inadvertent and insignificant mistake.

No order entered by the magistrate judge or the district judge contains a finding that the error in dates was either "inadvertent" or "insignificant." Nor is there record evidence on which either judge could have based a finding of inadvertence.

There is contrary evidence. An affidavit signed by the Pfeils' Chicago counsel confirms that he and Swisher discussed information Hutchinson sought on ten separate occasions while the initial and "revised" discovery responses were being drafted.

The Tenth Circuit was asked to take judicial notice of this evidence, but apparently failed to do so, choosing instead to rely on misrepresentations quoted above from the Pfeils' brief:

> [W]ith respect to Interrogatory 4, which asked Defendants to describe the ties certain listed individuals had with Oklahoma in connection with the exhibition of the Pfeils' collection at the Philbrook, Plaintiff asserts that the magistrate judge erroneously characterized Defendants' answer as a "fair response to the inquiry under the circumstances," rather than treating the answer as a failure to answer under Rule 37(a)(3). Defendants answered, with respect to Paul Swisher, Defendants' business agent, that he visited the Philbrook during the exhibition on September 26, 1992. In fact, as Plaintiff learned after the sanctions award had been entered, Swisher attended the Philbrook's opening gala the night before, on September 25, 1992.
>
> Hindsight shows that the magistrate judge's characterization of Defendants' answer to Interrogatory 4 was erroneous. Under *Pierce* [*v. Underwood*, 487 U.S. 552 (1988)], however, one inadvertent and insignificant error does not invalidate the sanctions award or necessarily require apportionment. The magistrate judge found that the discovery motions were not substantially justified because many of the requests were irrelevant and many of Plaintiff's counsel's arguments and objectives were inappropriate, e.g., attempting to compel different responses to requests for admission. (App. A at 7a-8a).

In elaborating on the propriety of the Pfeils' relevancy objections, the panel concluded that *Benally v. Amon Carter*

Museum of Western Art, 858 F.2d 618 (10th Cir. 1988), did not support Hutchinson's argument that the Pfeils should have been compelled to provide information about purposes, objectives, and goals to be furthered by exhibition of their Collection and the preparation and sale of the exhibition catalogue. (App. A at 7a). The panel also found that the Pfeils' objection to Request for Admission 18 "was clearly proper." (App. A at 7a).

The panel misapprehended the argument based on *Ager v. Jane C. Stormont Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980). The first prong of this argument -- viability of the sanctions order turns on the validity of the two underlying discovery orders -- rests squarely on the *Ager* court's holding that the viability of a contempt citation depends upon the validity of the underlying discovery order. The second prong follows. If the magistrate's failure to enter written discovery orders prevented Hutchinson from seeking review of those orders, the sanctions order cannot be deemed "viable." The panel mistakenly concluded that Hutchinson and his counsel "allege[d] that a written ruling was necessary to challenge the sanctions award." (App. A at 9a).

Court of Appeals' summary denial of Hutchinson's petition for rehearing.

Points of law Hutchinson contended the Tenth Circuit overlooked or misapprehended when it affirmed the trial court's order overruling his objections to the magistrate judge's 1995 protective/sealing order can be summarized as follows:

1. When the panel decided that "good cause" under Rule 26(c) could be established on the basis of arguments made by counsel alone, it misconstrued the Supreme Court's holding in *Seattle Times v. Rhinehart.*

2. Because the panel's decision on the First Amendment issue is premised on its "good cause" holding, it too is erroneous as a matter of law.

Points of law (or mixed law and fact) which Hutchinson and two of his attorneys contended the Tenth Circuit overlooked or misapprehended when it affirmed the district court's order overruling their objections to the magistrate's Rule 37(a)(4) sanctions order can be summarized as follows:

1. When the panel affirmed the sanctions award, it overlooked controlling Tenth Circuit authority holding that the viability of such an order depends upon the validity of the underlying discovery order.

2. Arguments concerning appellants' inability to seek review of the magistrate's oral discovery rulings in the trial court and Court of Appeals were misapprehended by the panel.

3. When the panel concluded that *Benally v. Amon Carter Museum of Western Art* does not support appellants' position, it misconstrued the Tenth Circuit's opinion in that case.

4. The panel overlooked a clear directive from Rule 36(a) when it concluded that the Pfeils' objection to Request for Admission 18 was "clearly proper."

5. The panel, like the magistrate and the district judge, overlooked Rule 37(a)(3) and failed to consider the evidence and arguments appellants presented about the Pfeils' answer to Interrogatory 4.

The petition for rehearing filed on behalf of Hutchinson and two of his attorneys was summarily denied by an order that stated, "Appellant's petition for rehearing is denied." (App. L at 58a). The order does not indicate whether all of the judges on the panel considered the contentions in the petition and voted to deny rehearing or if that task fell to the author of the panel's opinion.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Tenth Circuit's decision appears to conflict, directly or in principle, with this Court's *Seattle Times Co. v. Rhinehart* decision.

Though asked to hold that "good cause" under Rule 26(c) could not, as a matter of law, be established by arguments of counsel alone, the Tenth Circuit panel declined to do so, finding instead that "such a holding would be inconsistent with the broad discretion afforded trial judges under the rule." (App. A at 12a).

When the panel held that "good cause" could be shown *solely* by arguments of counsel, it did not give due consideration to the holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), or the Court's opinion in the case.[9] Had it done so, *Seattle Times* would have been summarized in different terms.

> The *facts* in this case illustrate the concerns that justifiably may prompt a court to issue a protective order. . . . We therefore hold that *where, as in this case, a protective order is entered on a showing of good cause as required by*

In *Seattle Times*, the Supreme Court held that a protective order entered pursuant to a state law patterned after Rule 26(c) does not offend the First Amendment. *Id.* at 37. *Seattle Times* does not address the showing required to estab-

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[9] When that opinion issued, federal courts were bound, under the principle of *stare decisis*, not only to the result of that case, but also those portions of the opinion necessary to that result *See Seminole Tribe of Florida v. Florida*, 517 U.S. 33, 67 (1996).

> *Rule 26(c)*, is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.
>
> *Seattle Times*, 467 U.S. at 37 (emphasis added).

lish good cause. On the contrary, the Supreme Court noted that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. *Id.* at 36. (App. A at 11a-12a).

It appears that what the Court meant by "a showing of good cause as required by Rule 26(c)" can be gleaned from its description of specific facts detailed in affidavits that persuaded the trial judge to issue the protective order under review and the Court's finding that that order was entered on such a showing:

> Relying on *In re Halkin*, 194 U.S. App. D.C. 257, 598 F.2d 176 (1979), the court refused to issue a protective order. It stated that the facts alleged by Respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" . . . . The court stated, however, that the denial of respondents' motion was "without prejudice to respondents' right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials." Record 16.
>
> Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. *They submitted affidavits of several Foundation members to support their request.* The affidavits detailed a series of

> letters and telephone calls . . . . The affiants also described incidents at the Foundation's headquarters involving attacks, threats, and assaults directed at Foundation members . . . .
>
> Persuaded by these affidavits, the trial court issued a protective order covering [specific information].

467 U.S. at 25-27 (emphasis added).

II.

The Tenth Circuit's decision conflicts with decisions of the First and the Fifth Circuits, but appears to be consistent with a decision of the District of Columbia Circuit on the issue of "good cause."

The panel's holding that "good cause" for entering a protective order restricting a party's use of information obtained via discovery can be demonstrated by nothing more than conclusory allegations or argument of counsel conflicts, directly or in principle, with decisions of at least two of its sister circuits. *See In re Terra Internat'l, Inc.*, 134 F.3d 303, 306-07 (5th Cir. 1998) (district court clearly abused its discretion in affirming magistrate's sequestration order under Rule 26(c)(5) where defendant did not support his motion for protective order with any affidavits or other evidence and record contained nothing more than conclusory allegations); *Anderson v. Cryovac, Inc.*,805 F.2d 1, 7 (1st Cir. 1986) (a finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements).

The panel's "good cause" holding appears to be consistent with a decision of the Court of Appeals for the District of Columbia. *See E.E.O.C. v. National Children's Center, Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996) (although some "showing of good cause" must be made before a protective order is issued,

concrete factual showings need not be made); *accord, Lohrenz v. Donnelly,* 187 F.R.D. 1, 9 (D.D.C. 1999).

The Court of Appeals' holding in *E.E.O.C.* is based on its stated belief that *In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979), was overruled by this Court in *Seattle Times.* The Court made specific reference to four of *Halkin's* holdings in *Seattle Times:* (1) protective orders require close scrutiny; (2) before a court should issue a protective order that restricts expression, it must be satisfied that the harm posed by dissemination must be substantial and serious; (3) the order must be narrowly drawn and precise; and (4) there must be no alternative means of protecting the public interest which intrudes less directly on expression. 467 U.S. at 26. Language quoted from *Seattle Times* on pages 20 and 21, *supra,* suggests that the second and third of these holdings were not overruled in that case. *See also Gulf Oil Co. v. Bernard,* 452 U.S. 89, 192 n.16 (1981) (to establish good cause for a protective order under Rule 26(c), courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements) (quoting and citing *In re Halkin* with approval).

III.

When the Tenth Circuit affirmed the sanctions order in the face of clear and convincing evidence that that order had been procured by fraud, it sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory powers.

The power to set aside fraudulently begotten judgments is necessary to the integrity of the courts, for tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44 (1991) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 245, 246 (1944)). If

the Court elects not grant certiorari and exercise its supervisory powers, it has the power to conduct (or direct one of the lower courts to conduct) an independent investigation in order to determine whether it has been the victim of fraud. *Id.* (citing *Universal Oil Prod. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946)).

Sanctions in this case were awarded against Hutchinson and two of his attorneys because they invoked the provisions of Rule 36(a) and Rule 37(a)(2) in order to secure information relevant to the Pfeils' jurisdictional defense, *e.g.*, information about contacts their agents had with the forum, the purpose underlying their exhibiting their $30 million art collection at the Philbrook and selling copies of the catalogue, and benefits to be derived from their agent's forum-related activities.

Instead of complying with the discovery provisions of the Federal Rules of Civil Procedure, the Pfeils, like Chambers, employed tactics of delay, obstruction, deception, oppression, and massive expense, to reduce Hutchinson and his lawyers to exhausted compliance. The only information provided in the Pfeils' initial and "revised" answer to Interrogatory 4 about the Oklahoma contacts of ASI and Swisher was blatantly false, *i.e.*, Swisher's only contact with Oklahoma occurred on September 26, 1992. Four documents were produced, a credit card statement, the ASI-Philbrook contract, a newspaper article, and one letter from ASI to the Philbrook. Only the first was identified as responsive to Document Request 10. Counsel for the Pfeils have made countless false and misleading statements to the magistrate judge, the district judge, and two Tenth Circuit panels to conceal their discovery misconduct, as well as that of their clients. In the process, procedural rules designed to aid those in Hutchinson's position were ignored, both by defense counsel and one or more federal judges.[10]

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[10] For example, instead of applying Rule 37(a)(3), as written, the magistrate judge considered the Pfeils' answer to

IV.

Denial of the petition for rehearing filed by Hutchinson and his counsel conflicts with decisions of other circuits that recognize a party's right to a panel rehearing upon making a *prima facie* showing under Rule 40(a)(2).

"A petition for rehearing is designed to bring to the panel's attention points of law and fact that it may have overlooked. Fed. R. App. P. 40(a). The panel is required to consider the contentions in the petition for rehearing if only to reject them." *Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990).

Prior to adoption of Federal Rule of Appellate Procedure 40 in 1967, courts that considered the issue held that petitions for rehearing were addressed to the court's discretion. *See, e.g., General Excavator Co. v. Keystone Driller Co.*, 64 F.2d 39, 40 (6th Cir.), *aff'd*, 290 U.S. 240 (1933). Exercise of that discretion was be governed by well-established principles. *See Railway Register Mfg. Co. v. North Hudson R. Co.*, 26 F. 411, 412 (Cir. Ct., D.N.J. 1886).

After adoption of Appellate Rule 40, federal courts have looked to its plain language for guidance. *E.g.:*

> The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision. A party "abuse[s] the privilege of making such a petition" when it seeks review of

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Interrogatory 4 to be "a fair response to the inquiry under the circumstances." (App. E at 28a-29a). The Tenth Circuit panel found "many of Plaintiff's counsel's arguments and objectives [] inappropriate, e.g., attempting to compel different responses to request for admission." (App. A at 8a). That, however, is what Rule 36(a) contemplates if objections are not justified or the answer does not comply with the requirements of that rule.

a scope greater than the limited confines of Fed. R. App. P. 40.

Armster v. United States Dist. Court, 806 F.2d 1347, 1356-57 (9th Cir. 1986) (dictum).

In this case, the review Hutchinson and his counsel sought was well within the scope of the limited confines of the governing rule. Contentions, summarized on pages 17-18, *supra*, "state[d] with particularity each point of law or fact that [they] believe[d] the court ha[d] overlooked or misapprehended." Fed. R. App. P. 40(a)(2). Though it directed the panel's attention to the fact that its decision was in conflict with controlling decisions of this Court and the Tenth Circuit and failed to address issues decisive of the case and duly submitted by counsel, the petition was summarily denied. *But cf. Foster v. MCI Telecommun. Corp.*, 773 F.2d 1116, 1117 (10th Cir. 1985) (petition for rehearing was granted where it properly points out that court failed to address an issue legitimately raised in the briefs). No opinion accompanied this ruling. Whether each member of the panel considered the contentions in the petition before rejecting it or whether that task was delegated to the judge who authored the opinion cannot be determined from the January 4, 2000 Order entered by the Clerk.

Six other circuits recognize a party's right to a panel rehearing under Rule 40 upon a proper showing. *See Long v. District of Columbia*, 469 F.2d 927, 936-37 (D.C. Cir. 1972) (if grounds advanced in appellant's petition for rehearing had been raised on appeal, but had not been "fully dealt with in our original opinion," rehearing would be proper) (implied); *Pentax Corp. v. Robison*, 135 F.3d 761, 762 (Fed. Cir. 1998) (if theory government identified in its petition for rehearing had been presented on appeal, but had been overlooked or misapprehended by the court, that theory would be addressed on rehearing) (implied); *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 439 (1st Cir. 1988) (petition for rehearing would be

entertained on showing that court had made "a demonstrable mistake") (implied); *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 51 (2d Cir. 1985) ("[T]he rules of appellate procedure are specifically designed to catch those instances when a panel misapprehends of overlooks some point of law or fact. The rules are meant to assure a party on appeal that its argument has been comprehended and considered by the Court.") (dictum); *Malady v. United States*, 120 F.3d 119, 120 (8th Cir. 1997) (petition for rehearing would be denied where plaintiff "has not shown that we overlooked or misapprehended any point of fact or law at the time we rendered our decision in this case"); *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks*, 122 F.3d 1379, 1381 (11th Cir. 1997) ("After reconsidering LSS & S's argument, we are now convinced that the district court procedurally overlooked LSS & S's position. Likewise, it appears that we neglected to fully address the issue.").

A. Favorable resolution of this conflict would assure every party on appeal that its argument has been comprehended and considered by the court, even if not addressed in the court's original opinion.

The fact that a litigant "has an opportunity to speak up" is meaningless unless the decisionmaker "must listen to what he has to say." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). In adjudicative proceedings, due process "requires that the decisionmake *actually consider* the evidence and argument that a party presents." *de la Llana-Castellon v. Immigration and Nat. Serv.*, 16 F.3d 1093, 1096 (10th Cir. 1994) (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936)) (emphasis added). A cursory review of the panel's opinion in this case will reveal that little, if any, of what Hutchinson and his counsel had to say on *decisive* issues. Whether the summary denial of their petition for rehearing, which made the *prima facie* showing prescribed by Rule 40(a)(2), violated petitioners' due process rights is a question presented by the circumstances of this case.

Under Rule 40, perceived errors in a panel opinion, like those Hutchinson and his counsel identified, are to be brought to the panel's attention through a petition for rehearing. *See Liberty Mutual Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 n.6 (8th Cir. 1993). "This procedure balances the concerns of fairness and accuracy with those of finality." *Id.* If these twin aims are to be realized, Rule 40(a)(2) must be construed uniformly and administered in an even-handed manner by every federal judge who sits on a three-judge panel.

By granting certiorari and deciding the third question presented by this petition, the Court can clarify whether words and phrases, drawn from federal decisions[11] and set out below in italics, are implicit in Rule 40(a)(2):

> The petition must state with particularity each *holding that conflicts with a controlling statute, procedural rule or decision,* point of law *decisive of the case and duly submitted by counsel,* or *material* fact that the petitioner believes the court has overlooked or misapprehended . . . .

Fed. R. App. P. 40(a)(2) (italicized terms added). Clarification of the applicable standard may significantly reduce the number

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[11] *E.g., Railway Register Mfg. Co. v. North Hudson R. Co.*, 26 F.2d at 412 (courts ordinarily listen to applications for reargument which allege that any question decisive of the case, and duly submitted by counsel, has been overlooked by the court or that the decision is in conflict with an express statute or controlling decision); *Haberman v. Equitable Life Assur. Soc. of U.S.*, 225 F.2d 837, 838 (5th Cir. 1955) (where incorrect statment of fact in opinion was not part of *ratio decidendi*, it was not grounds for rehearing); *N.L.R.B. v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953) (rehearing would have been proper if petitioner had directed the court's attention to some material matter of law or fact it overlooked in deciding the case and which, had it been given consideration, would probably have brought about a different result).

of petitions for panel rehearing that are filed in the future and ultimately lighten the work of the Courts of Appeals.

Inter- and intra-circuit uniformity could also be assured by the Court's defining fundamental requirements that should be observed by the Courts of Appeals as they decide approximately 9,000 petitions for rehearing every year.[12] *Cf. Western Pacific Railroad Case*, 345 U.S. 247, 260 (1953) (finding that if 28 U.S.C. § 46(c) was to achieve its purpose, certain fundamental requirements should be observed by the appellate courts, the Court invoked its general supervisory powers and defined those requirements).

Favorable resolution of this conflict among circuits would assure every party to an appeal that its argument has been comprehended and considered by the court, even if it is not addressed in the court's original opinion.

B. The duty of frank and corrective avowal should take first place in the order of judicial business.

Correction of legal error is a task borne largely by panels of the Courts of Appeals. *See Church of Scientology of Cal. v. United States*, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986) (Scalia, J.). That the error to be corrected may be its own should not deter a panel from granting a petition for rehearing if the proper showing is made. "It is more imporant that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Barden v. Northern Pacific R. Co.*, 154 U.S. 288, 322 (1894).

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[12] Government statistics indicate that 9,168 petitions for rehearing were filed in the Courts of Appeals during the year ending September 30, 1997. *See* U.S. Court of Appeals Summary, *Federal Court Management Statistics* at 27 (U.S. Dep't of Judiciary, 1997). Figures for the two preceding years were 8,973 and 8,823. *Id.* at 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 15.

By addressing and deciding the third question presented by this petition, and subsidiary questions fairly included therein, the Court can make it clear that "the duty of frank and corrective avowal takes first place in the order of judicial business." *Romatz v. Romatz*, 355 Mich. 81, 94 N.W.2d 432, 433-34 (1959), in the federal courts.

CONCLUSION

For the reasons set forth above, petitioners submit that the Court should allow the writ he seeks and decide the questions presented by this petition.

Respectfully submitted,

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APPENDIX A

[Filed November 9, 1999]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-5043
(N.D. Oklahoma / D.C. No. 92-C-1088-E)

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff - Appellant,

v.

RICHARD PFEIL; MARY JO PFEIL,

Defendants - Appellees.

JOAN GODLOVE; TODD ALEXANDER,

Attorneys - Appellants,

and

SONA JOHNSTON,

Nonparty Witness - Appellee.

ORDER AND JUDGMENT *

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The Court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before ANDERSON and BRISCOE, Circuit Judges, and KIMBALL,** District Judge.

Plaintiff-Appellant Thomas R. Hutchinson ("Plaintiff") appeals two discovery orders issued in the proceedings below. First, Plaintiff, together with his counsel, appeals the district court's affirmation of the magistrate judge's imposition of sanctions against him and his counsel under Rule 37(a)(4) of the *Federal Rules of Civil Procedure*. Second, Plaintiff appeals the district court's affirmation of the magistrate judge's order denying Plaintiff's motion to lift a protective order restricting the use and dissemination of documents and information obtained from a nonparty witness, Appellee Sona Johnston ("Johnston"). We consider each matter in turn, and AFFIRM the district court's rulings.

This Court has issued a prior decision in this case, *Hutchinson v. Pfeil*, 105 F.3d 562 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 298 (1997), which describes the underlying dispute. For that reason, only facts pertinent to the issues now before the Court are repeated here.

A. Rule 37(a)(4) Sanctions.

1. Background.

Because Plaintiff attacks the procedural underpinnings of the sanctions award, a detailed background is necessary. Plaintiff filed this action in the United States District Court for the Northern District of Oklahoma against Defendant-Appellees Richard B. Pfeil and Mary Jo Pfeil (together, "Defendants") to recover an interest in a painting known as "Summer Hillside,"

** The Honorable Dale A. Kimball, United States District Judge for the District of Utah, sitting by designation.

by Theodore Robinson. Plaintiff asserted that personal jurisdiction over Defendants existed in Oklahoma because of contacts that arose when the painting was displayed at the Philbrook Museum of Art in Tulsa, Oklahoma, for ten weeks in 1992. Defendants moved to dismiss on the ground that the district court lacked personal jurisdiction over Defendants, or, in the alternative, that venue was improper. Plaintiff was given the right to conduct discovery limited to the issues raised by Defendants' motion and did so.

The sanctions at issue were imposed on Plaintiff and his counsel by the magistrate judge at the conclusion of a hearing held on August 11, 1993, on motions filed by Plaintiff challenging the sufficiency of Defendants' responses to the discovery Plaintiff requested. Review of the transcript of that hearing shows that, over the repeated protestations of the magistrate judge, Plaintiff's counsel insisted on arguing in response to Defendants' initial discovery responses, as opposed to Defendants' revised responses, and argued at length on requests that were clearly outside the scope of the discovery allowed. At the conclusion of the hearing, the magistrate judge denied Plaintiff's motions and, *sua sponte*, awarded Defendants their reasonable expenses, including attorney fees, incurred in resisting the motions pursuant to Rule 37(a)(4). The stated basis for the magistrate judge's decision was that he "was unprepared to make a finding that the award of expenses, including attorney's fees in this case, is unjust." Defendants were directed to file an application for fees by August 20, 1993; Plaintiff was given until August 27, 1993, to respond as to the reasonableness of the fees requested.

Intending to file a motion to reconsider the award, Plaintiff asked Defendants if Defendants would agree to defer Plaintiff's response to their fee application until after the motion was decided. Defendants agreed. On August 19, 1993, Plaintiff's counsel filed a motion requesting the magistrate judge to recon-

sider and vacate the award on the ground that Plaintiff's counsel had not been afforded adequate notice and an opportunity to be heard before the sanctions had been imposed.

On August 26, 1993, the district court entered an order, prepared by Plaintiff for the magistrate judge's signature, extending the due date for Plaintiff's response to the fee application to ten days after Plaintiff received notice of any adverse ruling on his motion to reconsider.

The magistrate judge then granted the motion to reconsider and scheduled a hearing for October 13, 1993. At the hearing, Plaintiff's counsel stated that she was unprepared to argue the substantive sanctions issues, namely, whether the making of the discovery motion was substantially justified or whether other circumstances made an award of expenses unjust. Instead, Plaintiff's counsel stated that she wished to argue the "due process" issues, which had been rendered moot by the fact that Plaintiff's motion to reconsider had been granted. Plaintiff was given additional time to file a written brief addressing the propriety of the sanctions award and the reasonableness of Defendants' fee application, and a show cause hearing was scheduled for December 16, 1993.

Following the hearing, the magistrate judge issued an order, dated December 22, 1993, awarding Defendants attorney fees incurred in responding to Plaintiff's discovery motions in the amount requested. Plaintiff appealed the order to the district court, which affirmed the award on February 18, 1998.

2. Standard of Review.

Magistrate judges have the power to award attorney fees as non-dispositive discovery sanctions under 28 U.S.C. § 636. This Court will not overturn a sanctions award unless this Court finds that the district court abused its discretion in finding that the magistrate judge's order imposing the sanction was not

clearly erroneous or contrary to law. *See Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1465 (10th Cir. 1988) (finding district court appropriately applied clearly-erroneous or contrary-to-law standard in reviewing magistrate judge's imposition of non-dispositive discovery sanction); *see also GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993) (applying abuse-of-discretion standard to district court's discovery rulings).

3. Discussion.

Rule 37(a)(4)(B) provides that, if a motion to compel discovery is denied, the court shall, "after affording an opportunity to be heard," require the moving party or the attorney filing the motion, or both of them, to pay the reasonable expenses incurred in opposing the motion "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."

Whether a discovery motion is "substantially justified" depends on the particular facts of each case. The controlling definition of "substantially justified" is set forth in *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988), where the Supreme Court explained:

> "Substantially justified" is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word "substantial" can have two quite different -- indeed, almost contrary -- connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2415 (2d ed. 1945) -- as, for example, in the

> statement, "He won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," *ibid.* -- as, for example, in the statement, "What he said was substantially true." Depending upon which connotation one selects, "substantially justified" is susceptible of interpretations ranging from the Government's to the respondent's.
>
> . . .
>
> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" -- that is, justified to a degree that could satisfy a reasonable person.

Applying this standard, the magistrate judge assessed fees and expenses against Plaintiff and his counsel.

In Plaintiff's first line of attack, Plaintiff argues that his discovery motions were erroneously denied *in toto*, identifying ten discovery requests that he asserts were decided wrongly by the magistrate judge.

With respect to Interrogatories 8, 9, and 10 and Document Requests 14 and 15, Plaintiff asserts that the magistrate judge erroneously sustained Defendants' relevancy objections. The requests sought information concerning the objectives and goals of the Pfeils in collecting and exhibiting the art works displayed at the Philbrook and preparing an exhibition catalog. Plaintiff claims such information was placed at issue by Defendants when they argued that their forum-related activities were not commercial. As support for his position, Plaintiff cites

Benally v. Amon Carter Museum of Western Art, 858 F.2d 618 (10th Cir. 1988).

Benally does not support Plaintiff's position. In *Benally*, this Court decided whether the activities of a nonprofit organization constitute "transacting business" within the meaning of New Mexico's long-arm statute, concluding that "[w]hen a wrong results from purposeful, organized activity, in terms of a state's interest in redressing harm to its citizens, it makes little difference whether the activity was of a commercial character or not." *Id.* at 623. *Benally* makes clear that a nonresident's activities in the forum are determinative, and not the nonresident's motives for engaging in them. Plaintiff makes the same failing argument for Interrogatories 14, 18, and 19, which also sought information about Defendants' motives.

With respect to Request for Admission 18, which asked Defendants to admit they "purposefully availed themselves of the privilege of conducting activities within Oklahoma, thus invoking the benefits and protection of its laws," Plaintiff asserts that the magistrate judge erroneously denied his motion to determine the sufficiency of Defendants' answer and objection. Defendants denied the request and objected on the ground, among others, that the request asserted a legal conclusion. This objection was clearly proper.

Finally, with respect to Interrogatory 4, which asked Defendants to describe the ties certain listed individuals had with Oklahoma in connection with the exhibition of the Pfeil's collection at the Philbrook, Plaintiff asserts that the magistrate judge erroneously characterized Defendants' answer as "a fair response to the inquiry under the circumstances," rather than treating the answer as a failure to answer under Rule 37(a)(3). Defendants answered, with respect to Paul Swisher, Defendants' business agent, that he visited the Philbrook during the exhibition on September 26, 1992. In fact, as Plaintiff learned

after the sanctions award had been entered, Swisher attended the Philbrook's opening gala the night before, on September 25, 1992.

Hindsight shows that the magistrate judge's characterization of Defendants' answer to Interrogatory 4 was erroneous. Under *Pierce*, however, one inadvertent and insignificant error does not invalidate the sanctions award or necessarily require apportionment. The magistrate judge found that the discovery motions were not substantially justified because many of the requests were irrelevant and many of Plaintiff counsel's arguments and objectives were inappropriate, e.g., attempting to compel different responses to requests for admission.

In Plaintiff's second line of attack, Plaintiff argues that the sanctions award is void *ab initio* because the magistrate judge contradicted the district judge in directing Plaintiff to file a brief addressing the reasonableness of Defendants' fee application when the district judge had previously signed an order extending the due date for such briefing until 10 days after being notified of any adverse ruling on Plaintiff's motion to reconsider. This procedural inconsistency has no legal significance, having had no effect on Plaintiff's opportunity to have a full and fair opportunity to be heard. Essentially, the magistrate judge issued a superceding scheduling order concerning a matter that was, as the district court found in rejecting this argument, "well within his authority."

In a third and related line of attack, Plaintiff asserts that the sanctions award is void because the magistrate judge exceeded the scope of his authority in reconsidering the issue of whether to award sanctions in response to Plaintiff's motion to reconsider, as opposed to vacating the sanctions award on Fifth Amendment "due process" grounds, the relief Plaintiff specifically requested. This argument is without merit. Magistrate judges clearly have the power to award sanctions pursuant to

Rule 37(a)(4). Scheduling and conducting show cause hearings to determine whether to do so are merely subsidiary aspects of that power.

In Plaintiff's final line of attack, Plaintiff claims that the sanctions award is invalid because he was never given the independent right to appeal the magistrate judge's decision denying his discovery motions. Plaintiff's request that the magistrate judge be compelled to enter a written order denying the motions was ultimately denied by the district court as moot because Defendants' motion to dismiss for lack of personal jurisdiction had been denied.

Insofar as Plaintiff alleges that a written ruling was necessary in order to challenge the sanctions award, Plaintiff misapprehends the applicable standard of review. In reviewing the sanctions award, the relevant question is whether the discovery motions were substantially justified. An erroneous discovery ruling could lead a judge to erroneously conclude that a discovery motion was not substantially justified, but Plaintiff argues that his inability to appeal the discovery ruling in and of itself precluded Plaintiff from challenging the sanctions award. As this appeal itself evinces, such is simply not the case. The magistrate judge held two hearings on the sanctions award. Plaintiff had full and fair opportunity to challenge any of the bases underlying the magistrate's conclusion that Plaintiff's discovery motions were not substantially justified. The fact that he did not have the opportunity to do so in an additional, independent proceeding has no legal consequence.

For these reasons, we conclude that the district judge did not abuse his discretion in finding that the sanctions award entered by the magistrate judge was not clearly erroneous or contrary to law.

B. Protective Order.

1. Background.

Johnston is an art curator, scholar, and specialist in the works of Theodore Robinson. Presumably because of her expertise, Plaintiff issued a subpoena to her, commanding her to appear for a deposition on January 5, 1995, and to produce documents. Johnston moved to quash and moved for a protective order. On December 30, 1994, the magistrate judge granted the motions in part, issuing a blanket protective order restricting the use and dissemination of any documents or information obtained by Plaintiff from Johnston, or her employer, the Baltimore Museum of Art, to use in this case (the "1994 Order"). The magistrate judge did so in recognition of the proprietary interests of Johnston in her scholarship and research.

Neither Johnston nor Plaintiff appealed the 1994 Order. Johnston gave testimony and the Baltimore Museum of Art produced documents. Then, over three months later, Plaintiff filed an application to lift the protective order. The magistrate judge denied Plaintiff's motion on April 20, 1995 (the "1995 Order"). The 1995 Order also places the deposition transcript under seal. Plaintiff appealed the 1995 Order, which the district court affirmed.

2. Standard of Review.

A decision by the district court to enter, lift, or modify a protective order is subject to review only for abuse of discretion. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

3. Discussion.

Rule 26(b)(1) allows a party to obtain information from a person, including a third party to the litigation, concerning

"any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 26(c)(7) authorizes a court, "for good cause shown," to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden," including that "confidential research, development, or commercial information not be revealed or be revealed only in a designated way."

To resist discovery under Rule 26(c)(7), a person must first establish that the information sought constitutes confidential research, development, or commercial information and then demonstrate that its disclosure might be harmful. *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981).

Concerning the 1994 Order, Plaintiff argues that Johnston did not meet her burden to establish that the sought-after information was confidential within the meaning of Rule 26(c)(7) because Johnston's position was substantiated only by arguments made by counsel. Specifically, Plaintiff argues that the magistrate judge could not have been guided by common sense because he had no understanding of the background facts, inasmuch as, at that time, Johnston had not yet given her testimony or produced any documents and there were no background facts in the record. Concerning the 1995 Order, Plaintiff argues that the magistrate judge still could not have had an understanding of the background facts because he opted not to review the deposition transcripts or exhibits, which were then available.

As support, Plaintiff cites *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In *Seattle Times*, the Supreme Court held that a protective order entered pursuant to a state law patterned after Rule 26(c) does not offend the First Amendment. *Id.* at 37. *Seattle Times* does not address the showing required to establish good cause. On the contrary, the Supreme Court

noted that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Id.* at 36.

Plaintiff does not challenge the merits of the arguments made by Johnston's counsel or the merits of the rationale of the magistrate judge in accepting such arguments. Plaintiff asks this Court, essentially, to hold that good cause cannot, as a matter of law, be established on the basis of arguments made by counsel alone. We decline to do so, finding such a holding to be inconsistent with the broad discretion afforded trial judges under the rule. In other words, the fact that good cause for the protective order was established solely on the basis of arguments made by counsel does not by itself compel the conclusion that the magistrate judge abused his discretion in refusing to lift the protective order.

Plaintiff also argues that the protective order offends the First Amendment, an argument that is premised upon Plaintiff's ability to persuade this Court that the protective order was entered without good cause. Having failed in that endeavor, this argument similarly fails.

CONCLUSION

For the foregoing reasons, we AFFIRM both the district court's affirmation of the magistrate judge's imposition of sanctions under Rule 37(a)(4) and the district court's affirmation of the magistrate judge's order denying Plaintiff's motion to lift the protective order restricting the use and dissemination of documents and information obtained from Sona Johnston.

Entered for the Court

Dale A. Kimball
District Judge

APPENDIX B

[Filed February 18, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

Now before the Court are the two issues remanded by the Court of Appeals for this Court's consideration.

Summary Judgment was previously granted in favor of Defendants, and Plaintiffs appealed. The Court of Appeals affirmed the summary judgment, but remanded for consideration of Plaintiff's Objections to the Order of the Magistrate Judge Denying the Motion to Lift the Protective Order and Plaintiff's Objections to the Sanctions imposed on him by the Magistrate Judge.

Protective Order

This motion concerns the use of the deposition of Sona Johnston, which was taken during the course of discovery in

this case. Ms. Johnston was noticed for her deposition shortly after the filing of the companion Lanham Act lawsuit. She timely filed a motion for protective order, arguing that the deposition should not be taken because of her pending motion to dismiss in that case and because the anticipated scope of the deposition exceeded the bounds of the pending issues. At a hearing held in December, 1994, Magistrate Judge Wagner overruled the motion for protective order, permitting the deposition of Ms. Johnston to be conducted, but entered a protective order limiting the deposition to six hours and prohibiting the dissemination or use of the deposition or any documents obtained in the deposition other than in connection with this case. In the Order, Magistrate Judge Wagner specifically stated:

> However, recognizing the legitimate proprietary interests of Ms. Johnson with respect to her scholarship and research, the court hereby enters a protective order restricting the use and dissemination of any documents or information obtained by Plaintiffs from Ms. Johnston or her employer, the Baltimore Museum of Art. Documents, materials, photographs, or information obtained by virtue of the Deposition of Ms. Johnson in this case, or the subpoena served upon the Baltimore Museum of Art in this case are to be used only in connection with this case, and are not to be further disseminated, quoted, cited or otherwise used for any other purpose whatsoever, without an order of this court specifically authorizing such further dissemination or use.

Neither party appealed the discovery order, and the deposition went forward on January 4, 1995. After the deposition was taken, the Hutchinsons filed a motion to lift the protective order, claiming that during the deposition, "there was no evidence pro-

duced to which a protective order should apply." The Motion was denied, except with regard to documents brought into the deposition by Plaintiffs' counsel. This appeal followed.

Modification, or lifting of a protective order is left to the discretion of the district court. United Nuclear Corp v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990). Under a blanket or umbrella protective order, like the one entered in this case, the burden of proof justifying the need for the protective order remains on the initial movant (Ms. Johnston), while the burden on the opposing party is to raise the issue of confidentiality with respect to individual documents. See In re Alexander Grant & Co. Litigation, 820 F.2d 352, 356 (11th Cir. 1987). Moreover, as both parties acknowledge, the standard for allowing a protective order under 26(c), Fed.R.Civ.P. is "good cause shown." Centurion Industries, Inc. v. Warren Steurer, Etc., 665 F.2d 323, 325 (10th Cir. 323, 325).

In this case, the Hutchinsons argue that the order entered on December 30, 1994 was clearly erroneous and contrary to law. In this regard, the Hutchinsons argue that the December Order was entered without the necessary affidavits and proof, and that it inappropriately covers all documents, regardless of whether they include confidential or proprietary information. However, the decision to enter a protective order is not under review here, because it was not timely appealed by either party. Plaintiffs Application and Brief to Lift Protective Order appear to be little more than an untimely attempt to appeal an order with which they are displeased. The Court is concerned by the tactic of Plaintiffs in which they did not appeal the Order, received the information sought, and only then attack the order on grounds available to them previously.

Moreover, while it is too late to challenge the blanket order itself, Rule 72, Fed.R.Civ.P., the Court specifically notes its propriety and shares the concern of the Magistrate Judge

over the dissemination of Johnston's research and opinions. The Court is further convinced that uncontrolled dissemination of Johnston's research would be harmful to Johnston and to her career.

Lastly, while Plaintiffs are not foreclosed from challenging the confidential designation of certain documents produced at the deposition, they have not carried their burden of identifying those documents. See Alexander Grant & Co., 820 F.2d at 356. Plaintiff's Objection to the Order of the Magistrate Judge denying the Motion to Lift Protective Order is denied.

Sanctions Imposed by Magistrate Judge

After series of hearings on various discovery motions, the Magistrate Judge, in an Order dated December 22, 1993, awarded sanctions against the plaintiff based on Fed.R.Civ.P. 37(a)(4) in the amount of $7,414.77 for filing a motion to compel discovery that was not substantially justified. In that same Order, the Magistrate Judge identified what he described as "abusive litigation practices," and certified the entire record to the undersigned with a recommendation that appropriate sanctions be considered for this motion. Because, as of this time, no additional sanctions have been awarded, the sole issue for this court's review[1] is whether the magistrate judge's conclusion that the motion to compel was not substantially justified is clearly erroneous or contrary to law.

---

[1] Plaintiff, in his appeal of this Order, also raised the argument that the Magistrate Judge lacked jurisdiction to preside over a hearing on plaintiff's show cause motion and lacked power to enter an order which prohibits the filing of pleadings without prior approval of the District Judge. Because of the procedural posture of this case, where the Court of Appeals has affirmed an order granting a dispositive motion, these issues are moot and need not be considered here.

The primary thrust of plaintiff's argument is not whether the decision regarding the sanctions was correct, but rather amounts to an attack on the procedural underpinnings of the sanctions award. This argument is not persuasive. Plaintiff's assertion that he was deprived of due process by not being given an opportunity to be heard on the sanctions issue is frivolous. Plaintiff's Motion to Reconsider on this basis was granted, and two subsequent hearings were held. Similarly the assertion that the Magistrate Judge "failed to exercise jurisdiction delegated to him and exceeded that granted him" is without merit. A review of the record reveals that the actions of Magistrate Judge, and the issues that he ruled upon were well within his authority and consistent with the Orders of the District Court.

Plaintiff then argues that his Motion to Compel was substantially justified. In reviewing the discovery requests and the briefing on these discovery issues, the Court concludes that the Magistrate Judge's opinions that the Motion to Compel was not substantially justified is not clearly erroneous or contrary to law. The Magistrate Judge concluded that many of the requests were irrelevant, outside the limited scope of discovery, and that some arguments raised in the discovery motions concerned material that had been provided by the defendants. Similarly, the conclusion that there are no other circumstances that make an award of expenses unjust is not clearly erroneous.

Conclusion

The Court denies Plaintiff's objections to the Order of the Magistrate Judge denying the Motion to Lift Protective Order and denies Plaintiff's objections to the Order for Sanction of the United States Magistrate Judge. Plaintiff is directed to respond to the Application for Attorneys' Fees and Costs to be Assessed Against Plaintiff and His Counsel (Docket #181) on the issue of liability for attorneys' fees only within 20 days of the date of this Order.

Dated, this 18th day of February, 1998.

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

[Filed September 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, Deceased,

Plaintiff,

v.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTIONS BEFORE
HON. JOHN L. WAGNER, MAGISTRATE JUDGE
AUGUST 11, 1993

APPEARANCES

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Tulsa, Oklahoma 74103

MS. GODLOVE: . . . . The Pfeil Collection, and the exhibition of the Pfeil Collection in Tulsa, is part of what appears to be about a three-year project to exhibit these 87 paintings in eleven different cities in the United States, certain cities in Europe and Japan. All of the material developed in support of that, the catalog and the publicity, I mean it appears to be a package, and it's difficult to segregate out the Philbrook from the whole. What was said earlier about the plaintiff, the Hutchinson estate, learning about the Pfeils' asserted ownership in Summer Hillside relates to the beginning of a national exhibition of this collection. And the reason, in a sentence or two, that this case was filed here in Oklahoma is because it first came to light, in a manner which could come to the attention of the Hutchinson Estate, that the Pfeils were the owners of Summer Hillside and were, in fact, the people who bought it at Sotheby's in 1986. It may be fortuitous that the plaintiff learned of that ownership interest here in Oklahoma, but there's nothing fortuitous about the plan of the Pfeils to allow Summer Hillside to be exhibited at the Philbrook. And if the court has an opportunity to review the agreement signed in 1989, and this exhibit mind you did not even open here until September of '92, the agreement in March of 1989 reserved the right, the absolute right, to the Pfeils to reject the Philbrook as a possible location for exhibition of their paintings. Plaintiffs have merely sought, and despite the suggestion made perhaps not by Mr. Carter himself but at the urging of other attorneys, here or in Indiana, that the plaintiffs are simply trying to get discovery in this case that they have been unable to get in Indiana, is totally baseless in fact. Plaintiffs have endeavored, despite arguments of defense counsel and concern of the court, plaintiffs have endeavored to secure information that we believe to be relevant to the issues of venue and jurisdiction and arguments made in the defendants' brief in support of their motion to dismiss, based upon our review of case law and our attempt to find cases that come as close as we can to a situation like that presented to this court. Thank you.

THE COURT: Anything further?

MR. CARTER: Your Honor, I'm satisfied that you've heard all the relevant facts regarding these discovery issues. If there is anything that you have questions on, regarding or anything regarding this submission of amended responses, I would be happy to reply to that. Otherwise, I will rest.

THE COURT: Okay, document number 11, the motion to determine the sufficiency of responses to request for admissions will be denied. Number 14, the plaintiff's motion to compel will be denied. Plaintiff will respond to the defendants' motion to dismiss by Friday, August 27th. Rule 37(a)(4) provides as follows: In connection with motions to compel, that if the motion is denied the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them, to pay the party or deponent who oppose the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances making award of expenses unjust. Given the circumstances surrounding these motions, the material that I have read, the arguments that I have heard, the court is unprepared to make a finding that the award of expenses, including attorney's fees in this case, is unjust. Mr. Carter, do you know how much time has been spent in responding to these motions?

MR. CARTER: Your Honor, I would have to consult with counsel in Chicago to give you an accurate statement.

THE COURT: All right. If you would be so kind as to file an application for costs and expenses in connection with this motion, setting out those costs and expenses, including attorney's fees, with specificity. Would it be reasonable to say by August 20th?

MR. CARTER: That would be fine, Your Honor.

THE COURT: All right. And I would like to give the plaintiff here an opportunity to respond or object or stipulate to the reasonableness of that application by August 27th. At this time the court will award reasonable costs and expenses, including attorney's fees incurred in connection with these two motions, that appear at docket number 11 and docket number 14, subject to a determination as to a reasonable amount based on the application [and] response thereto. That award will be against both the plaintiff and counsel's attorney, jointly and severally.

APPENDIX D

[Filed August 26, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER EXTENDING TIME FOR PLAINTIFF AND HIS COUNSEL TO FILE AND SERVE THEIR RESPONSE TO DEFENDANTS' APPLICATION FOR DETERMINATION OF AMOUNT OF ATTORNEYS' FEES AND COSTS TO BE ASSESSED AND BRIEF IN SUPPORT THEREOF

This matter is before the Court on Plaintiff's Motion for Extension of Time Within Which to File and Serve Response to Defendants' Application for Determination of Amount of Attorneys' Fees and Costs to be Assessed Against Plaintiff and His Counsel and Brief and the Court, being duly advised in the premises and finding that defendants have no objection to the extension sought by plaintiff and his counsel, GRANTS plaintiff's motion.

IT IS, THEREFORE, ORDERED that the time for plaintiff and his counsel to file and serve their response to Defendants' Application for Determination of Amount of Attorneys' Fees and Costs to be Assessed Against Plaintiff and His Counsel and Brief in Support Thereof shall be, and hereby is, extended from Friday, August 27, 1993, to and including a date ten days after plaintiff receives notice of any adverse ruling which may hereafter be entered by the Magistrate Judge on Plaintiff's Verified Motion to Reconsider Oral Ruling on Rule 37(a)(4) Sanctions.

DATED: 8/26/93

s/ James O. Ellison
[crossed out] JOHN LEO WAGNER, MAGISTRATE JUDGE
United States District Court
Northern District of Oklahoma

APPENDIX E

[Filed January 24, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON,

Plaintiff,

v.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTIONS BEFORE
HON. JOHN L. WAGNER, MAGISTRATE JUDGE
DECEMBER 16, 1993

APPEARANCES

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THE COURT: . . . . [T]he real crux of what they're objecting to here is that even when we got to the hearing, I mean long after you had had these supplemented responses and had a chance to review them, I take it had reviewed them, I mean we're still arguing that they hadn't responded to discovery requests to which they had fully responded in the supplemental responses. Now it doesn't matter whether they were filed or served on the 21st or the 23rd of July. We're talking about a hearing here in August. And frankly, I had some difficulty with that. Surely at that point it would have been a simple thing to say, Judge, I've reviewed their revised responses and we don't have an issue with regard to numbers whatever they are. But instead, as I recall, you continued to press for answers and responses to matters that had already been answered and responded to by means of these supplemental responses. Isn't that right?

MS. GODLOVE: Your Honor, the statement that they were revised responses means that they revised them to some extent. It did not eliminate the problems. And plaintiff did not, at the hearing, press to the best of my recollection, I do not inadvertently want to misrepresent anything to this court, but to the best of my recollection, I did not press the matters for decision by this court that I felt had been cured by the supplemental responses. One, if I may direct the court's attention to the defendants have just recently filed a document they call their objection to plaintiff's motion for order continuing hearing. If I may approach the bench.

THE COURT: You may.

MS. GODLOVE: On page 6 of that document, they say plaintiff focuses on defendants' answer to interrogatory 4 to support the claim of incompleteness of the defendants' discovery responses. And they go ahead and say that, on the next page, attached hereto as exhibit C is a copy of the defendants'

revised answer to interrogatory 4, which the defendants submit is a complete answer. Now if the court looks at number 3 first, interrogatory number 3, it asks, describe in detail any contacts, ties or relationships you have had with Oklahoma or its individual or corporate residents before, during or after exhibition of the Pfeil Collection at the Philbrook. The Pfeils' answer to that interrogatory was, the defendants have had no quote, contact, ties or relationships, close quote, quote with Oklahoma or its individual or corporate residents before, during or after exhibition of the Pfeil Collection at the Philbrook. Now that, I would say, is a complete answer to that interrogatory. When you look at number 4, it seeks the same information in detail about contacts, not only with Oklahoma, but also with any of its individual and corporate residents. And if the court will look at their revised response on page 7 of that document, none of the persons listed in interrogatory number 4 is or at any relevant time was an agent of the defendants in connection with the exhibition of the Pfeil Collection at the Philbrook with the exception of Paul Swisher and Robert Zimelis. Now looking carefully at this response, the only quote, contact, ties or relationships, close quote, that Mr. Swisher had with Oklahoma before, during or after exhibition of the Pfeil Collection at the Philbrook was a visit to the Philbrook during the exhibition on September 26, 1992 and telephone calls related thereto, period. Focusing just on this response to Mr. Swisher, you can see that it is limited to his contacts with Oklahoma, apparently terra firma. It does not respond, as the Pfeils had in interrogatory answer number 3, it had said nothing, absolutely nothing about --

(END OF TAPE -- SMALL PORTION NOT RECORDED)

THE COURT: -- that person has some sort of, has submitted himself to the jurisdiction of the state of Oklahoma.

MS. GODLOVE: Your Honor, what plaintiff was trying to do here, and the court --

THE COURT: Disagreed with what you were trying to do.

MS. GODLOVE: But what I'm saying is, Your Honor, when you look at this sentence related to Paul Swisher, you will see that there is absolutely no mention, there is no response to that part of the interrogatory which sought detailed information about his contacts with individuals. Now, they had a choice to object to providing that information, or [not] providing it. Now if they had a basis to object to providing it, they should have said we object to telling you what individuals Paul Swisher had contact with. Now I will explain to the court why that's important. In virtually every decision, even going back before International Shoe, the Supreme Court has said that to make a determination about minimum contacts, what the court needs to look at are facts which establish the nature and quality, that phrase, the nature and quality of the activities within the forum have to be the court's focus.

THE COURT: But there were no activities within the forum.

MS. GODLOVE: Oh, but here it says Mr. Swisher came to the Philbrook, was here on September 26th as an agent of the Pfeils and he made telephone calls related thereto. It gives us absolutely no information about what the nature and quality of his contacts with people in this state were. And we submit that this is the inquiry the court has to make in making its factual determination on the jurisdictional issue, and that in responding to this, which they have said time and again, is a complete answer. And the court is, of course, familiar with the provision of Rule 37(a)(3) that says an incomplete or evasive answer is for purposes of this --

THE COURT: And the court ruled at the time that I considered this to be a complete answer, this be a fair response

to the inquiry under the circumstances, and I really don't have a different view as to that. We're getting to the point here where we're rearguing, on an interrogatory by interrogatory basis, the underlying discovery dispute, which I really didn't want to. Ms. Godlove, you've been up here speaking for almost, well over an hour now, almost an hour and a half. And I want to give you a full opportunity to be heard, but I think at this point that I would not be unkind to say let's get to the point.

[Filed December 22, 1993]

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER FOR SANCTIONS, CERTIFICATION OF RECORD AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This order and recommendation addresses all pending matters, with the exception of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, or, In the Alternative, for Improper Venue (Docket #5),[1] which has not been referred and

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

is therefor reserved for disposition by the district court.[2] Hearings were held on August 11, and December 16, 1993, and extensive oral arguments were heard.

Plaintiff, a resident of the State of Washington, claims to be the owner, through descent, of a one-third interest in an oil painting by American Impressionist artist Theodore Robinson, titled "Summer Hillside, Giverny". The painting was purchased by the defendants at a public auction from Sotheby's in New York City in 1986, and is part of a touring exhibition entitled "Masterworks of American Impressionism from the Pfeil Collection," which is being showcased in eleven art museums in the United States. Plaintiff claims that, because the painting was displayed at the Philbrook Museum of Art in Tulsa, Oklahoma for ten weeks in 1992, this court has jurisdiction to hear his claim as the personal representative of the estate of Robert W. Hutchinson for partition and an accounting.

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[2] Pending matters include the court's reconsideration of its oral ruling on Federal Rule of Civil Procedure 37(a)(4) sanctions, the Application for Determination of Amount of Attorney's Fees and Costs to be Assessed Against Plaintiff and His Counsel (#28), Defendants' Response to Plaintiff's Motion to Reconsider Rule 37(a)(4) Sanctions (#37), the Notice of Continuing Violation of Rule 11 and Local Rule 30(B)(18) and Plaintiff's Intent to File Motion for Imposition of Appropriate Sanctions Under Rule 11 and 28 U.S.C. § 1927 (#47), Plaintiff's Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not Be Disqualified for Making False Statements of Law and Fact to the Court (#49), Defendants' Response to Plaintiff's Notice of Continuing Violation of Rule 11 and Local Rule 30(B)(18) and of Intent to File Motion for Imposition of Sanctions (#51), Defendants' Response to Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not Be Disqualified for Making False Statements of Fact and Law to the Court (#53), and Plaintiff's Motion for Order Allowing Additional Discovery Requests to be Served and Shortening Time for Defendants' Written Responses and Production of Requested Documents (#58).

The defendants moved to dismiss the complaint (#5) on the grounds that this court lacks personal jurisdiction over the defendants, or, in the alternative, that venue is improper in this district, alleging that the one-time fortuitous display of "Summer Hillside," Giverny" in Tulsa during 1992 does not meet jurisdictional requirements. In an Agreed Order entered on May 12, 1993 (#8), the court directed that, before responding to the defendants' Motion to Dismiss, the plaintiff could "initiate discovery limited to the issues of personal jurisdiction and venue raised in the Defendants' Motion to Dismiss." The plaintiff propounded "Plaintiff's First Request for Admissions", "Plaintiff's Second Set of Interrogatories", and "Plaintiff's Second Request for Production of Documents" upon the defendants.

When defendants responded to the interrogatories, produced documents, and responded to the requests for admissions, plaintiff brought a motion to compel discovery (#14) and a motion to determine the sufficiency of the responses (#11). Defendants subsequently submitted revised responses, which were attached as "Exhibit B" to Defendants' Response to Plaintiff's Motion to Compel Discovery (#18).

On August 11, 1993, this court conducted a lengthy hearing on the plaintiff's motion. At the conclusion of that hearing, the court denied both motions and, sua sponte, awarded the defendants their reasonable expenses, including attorney's fees, incurred in resisting the discovery motions, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure. Counsel for defendants were directed to file an application for attorneys fees by August 20, 1993, setting out with specificity the time records showing their work in connection with the plaintiff's discovery motions. The plaintiff was then given until August 27, 1993 to file a response contesting the reasonableness of the fee request.

The plaintiff filed a motion to reconsider the award of expenses (#26) on August 19, 1993, a day before the defen-

dants' fee application was due. In this motion, plaintiff's lawyer claimed that the court did not afford her adequate notice and an opportunity to be heard before imposing sanctions. The defendants filed their objection (#37) on September 3, 1993, but earlier that morning the court had already entered an order granting the motion for reconsideration and scheduled a hearing for October 13, 1993.[3] Despite the fact that the court had previously granted her motion to reconsider, plaintiff's attorney filed a reply on October 1, 1993. Then, at the October 13th hearing, plaintiff's counsel stated that she wished to argue the "due process" issue (which had clearly been rendered moot by the fact that her motion to reconsider had already been granted) and that she was not prepared to argue the pertinent questions of whether the making of the discovery motions was substantially justified or whether other circumstances made an award of expenses unjust. She then asked for additional time to file a written response on the substantive fee issues, and for a continuation of the hearing. The court granted her requests and gave her until November 30, 1993 to file a written response. The hearing was continued to December 16, 1993.

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[3] Plaintiff's motion lacked substantial merit, but the court granted it to avoid even a perceived affront to due process. See American Health Systems Inc. v. Liberty Health System, 1991 U.S. Dist. LEXIS 13382 (E.D. Pa. 1991), where the court said:

> Counsels' argument of being denied due process for not having been given adequate opportunities to explain their position is meritless. Counsel asserts that this Court erred in failing to allow a third response and in failing to hold an evidentiary hearing before it imposed the civil sanctions under Rule 37 (a)(4). I find this position to be unsupportable. The courts have consistently rejected the position put forth by defendant and their counsel that a hearing must always precede the imposition of sanctions. (Citations omitted).

However, instead of simply addressing the substantive fee issues, plaintiff embarked on a "scorched earth" briefing campaign that inundated the court with shrill essays designed to rankle the opposition and constern the court. Defense counsel were "put on notice" of "continuing" Rule 11 violations (#47), and were sought to be disqualified "for making false statements of law and fact to the court" (#49).[4] On November 18, 1993, plaintiff's Motion for Order Allowing Additional Discovery Requests to be Served and Shortening Time for Defendants' Written Responses and Production of Requested Documents (#58) was filed.[5]

In response, defendants identified fourteen filings stemming from plaintiff's frustrated discovery efforts, and resisted further ancillary discovery proceedings (See #62). Then plaintiff filed, in two and one-half weeks, four additional pleading salvos:

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[4] These allegations were particularly disturbing. Examination of the alleged "misstatements" showed that they amounted to no more than a departure from plaintiff's counsel's version of contested law and facts.

Defense counsel have, to their credit, exercised remarkable restraint throughout their ordeal, and have not overreacted to, nor succumbed to such overreaching. Their responses have been consistently professional, even when plaintiff's counsel went so far as to suggest that the court ". . . should not hesitate to investigate allegations of fraud on the court (voiced by plaintiff's counsel against her opponents) and to do so effectively by enlisting the aid of the United States Attorney for the Northern District of Oklahoma to carry out that task." See Plaintiff's Objections to Decision of Magistrate Judge to Impose Sanctions Under Rule 37(a)(4) and Award Expenses Sought by the Pfeils that are Unreasonable and Improper (#64), at page 13.

[5] At the December 16, 1993 hearing counsel for plaintiff agreed that this motion has become moot.

APPENDIX F

1. Plaintiff's Objections to Decision of Magistrate Judge to Impose Sanctions Under Rule 37(a)(4) and Award Expenses Sought by the Pfeils That Are Unreasonable and Improper (#64);[6]

2. Plaintiff's Motion for Order Continuing Hearing on Defendants' Motion to Dismiss From December 16, 1993 to a Date to Be Set After the Chief Judge Determines Whether Plaintiff is Entitled to Further Discovery Relevant to Issues Raised by Defendants' Motion (#65), and brief in support (#66);

3. Plaintiff's Motion for Order Recalling Reference of Discovery Motions to the Magistrate Judge and Vacating His Minute Order Setting Plaintiff's Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not be Disqualified for Hearing Before the Magistrate Judge on December 16, 1993 (#68), and brief in support (#69);

4. Plaintiff's Motion for Expedited Ruling on His Motion for Continuance of Hearing on Defendants' Motion to Dismiss and Motion to Recall Reference to Magistrate Judge of Discovery Motions and Vacate Hearing Before Magistrate Judge on Plaintiff's Show Cause Motion Or, in the Alternative, for Order Temporarily Continuing December 16, 1993 Hearing on Those and Other Matters (#70).[7]

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[6] In all fairness, it should be noted that this pleading was responsive to the court's instruction (orally given at the aborted October 13, 1993 hearing) to address the merits of the proposed Rule 37(a)(4) sanctions award.

[7] In Defendants' Objections to Plaintiff's Motion to Allow Additional Discovery (#62), defendants note that these filings alone contain more than 1,000 pages (pg. 4) and that "there have been

On December 16, 1993, Chief Judge James O. Ellison denied the motions set out in paragraphs 2, 3, and 4 above (#65, #68, and #70).

In considering an award of sanctions under Rule 11 of the Fed. R. Civ. P. and 28 U.S.C. § 1927, the Tenth Circuit concluded in Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987),[8] that "[t]he basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond.[9] Glass v. Pfeffer, 657 F.2d 252, 257-58; Charczuk v. Commissioner, 771 F.2d 471, 476 n.4 (10th Cir. 1985).

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approximately nineteen motions, memoranda, and supporting documents filed in connection with plaintiff's unsuccessful discovery motions, not including 'routine' motions, such as for leave to file reply memoranda and for extensions of time." (pg. 3).

[8] The court specifically excluded sanctions under Fed. R. Civ. P. 37 from its discussion. See Braley, at 1510, n.4.

[9] It is noted that plaintiff's counsel has complained in the past that she was sanctioned without benefit of a hearing. On that occasion the 7th Circuit Court of Appeals concluded:

> Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse caused by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion.

Godlove v. Bamberger, Foreman, Oswald, and Hahn, 903 F.2d 1145, 1148-49 (7th Cir. 1990).

The court has gone to great lengths to assure that plaintiff received proper notice that sanctions were being considered and an opportunity to be heard on this matter. While not convinced of the impropriety of ordering sanctions sua sponte at the original hearing, in order to be unquestionably fair the court reconsidered and vacated the original order and provided plaintiff with two additional opportunities to be heard.

Pursuant to Federal Rule of Civil Procedure 37(a)(4), which deals with motions for orders compelling discovery, "[i]f the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."

Plaintiff's counsel noted in her pleading styled "Plaintiff's Objections to Decision of Magistrate Judge to Impose Sanctions Under Rule 37(a)(4) and Award Expenses Sought by the Pfeils That Are Unreasonable and Improper" (#64) that the Supreme Court in Pierce v. Underwood, 487 U.S. 552 (1988), set out the definition of "substantially justified":

> 'Substantially justified' is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word 'substantial' can have two quite different - indeed, almost contrary - connotations. On the one hand, it can mean '[c]onsiderable in amount, value, or the like; large,' Webster's New International Dictionary 2415 (2d ed. 1945) - as, for example, in the statement,

> 'He won the election by a substantial majority.' On the other hand, it can mean '[t]hat is such in substance or in the main,' ibid. - as, for example, in the statement, "What he said was substantially true.' Depending upon which connotation one selects, 'substantially justified' is susceptible of interpretations ranging from the Government's to the respondents'.
>
> We are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main' - that is, justified to a degree that could satisfy a reasonable person.

Id. at 564-65 (emphasis added).

The court finds that under this definition plaintiff's original discovery motions were not substantially justified. Many of the interrogatories and requests for production to which defendants objected are irrelevant to the issues of personal jurisdiction and venue, such as those seeking the value of the painting (Interrogatories No. 1, 8, 9, and 20 and Request No. 14 and 24) and Interrogatory #12 and Request #33, which inquire about a 1987 exhibition of the painting. In addition, the court noted during the August 11, 1993 hearing that defendants denied several requests for admissions and provided answers to interrogatories and plaintiff's counsel attempted to compel different responses (Transcript of Hearing, pgs. 31-34, 43-47, 49-50, 55-62). The interrogatories and requests are attached as exhibits to the Appendix of Plaintiff's Motion to Compel Discovery (#16).

Defense counsel have requested a total of $18,205.58 in attorney fees and expenses. The court finds that fees should be

awarded to defendants under Federal Rule of Civil Procedure 37(a)(4) in the amount of $7,414.77, the amount requested in Defendants' Application for Determination of Amount of Attorney's Fees and Costs to be Assessed Against Plaintiff and His Counsel (#28).[10] Plaintiff and plaintiff's counsel are to be jointly and severally liable for payment of this award. It is to be paid by January 17, 1993, or, if this order is appealed, within thirty (30) days of the date of a decision affirming this order.

Certification of Record and Recommendation for Consideration of Additional Sanctions

The court has considered the Notice of Continuing Violation of Rule 11 and Local Rule 30(B)(18) and Plaintiff's Intent to File Motion for Imposition of Appropriate Sanctions Under Rule 11 and 28 U.S.C. § 1927 (#47), Plaintiff's Motion for Order Directing the Pfeils to Show Cause Why Defense

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[10] There is sufficient authority to support the award of the entire amount claimed. In Glass v. Pfeffer, 849 F.2d at 1265, the court said:

> [W]hen, as here, attorneys engage in scorched earth tactics to challenge such a fee award, a refusal to permit recovery of additional fees for defending that award would allow counsel to dilute the value of the original award or force the recipient to abandon that award entirely.
>
> Although a party in Forster's position should not always be entitled to additional attorney's fees for defending, at a due process hearing, an earlier fee award, we uphold the award of additional fees here.

Despite this authority, the court has today awarded only those fees incurred prior to, and in connection with the August 11, 1993 hearing on plaintiff's discovery motions, leaving the fees incurred subsequent to that date to be addressed in the context of Rule 11 and § 1927.

Counsel Should Not Be Disqualified for Making False Statements of Law and Fact to the Court (#49), which is hereby denied, and Defendants' Response to Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not be Disqualified for Making False Statements of Law and Fact to the Court (#53), as well as plaintiff's questionable allegation of "fraud on the court" contained in the Brief in Support of Plaintiff's Motion for Order Recalling Reference of Discovery Motions to the Magistrate Judge and Vacating his Minute Order Setting Plaintiff's Motion for Order Directing the Pfeils to Show Cause Why Defense Counsel Should Not Be Disqualified for Hearing Before the Magistrate Judge on December 16, 1993 (#69).

The court concludes that the allegations against defendants' lawyers by plaintiff's counsel are spurious and unwarranted. Plaintiff's counsel has been fervid in her slanted representations to the court and the awarding of sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 may be appropriate. Beyond these provisions, it is clear that a court has inherent power to "levy sanctions in response to abusive litigation practices". Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993); Turnbull v. Wilcken, 893 F.2d 256, 258-29 (10th Cir. 1990). Such sanctions, if imposed, should take into consideration the sum of $10,790.81, which represents the amount set out in Defendants' supplemental fee requests (see #52, #72, and #73). However, this amount quantifies only expenses and fees incurred in connection with sanctions issues, after the initial motion to compel was argued. It does not take into account the fees and expenses incurred by defendants in responding to all the other arguably vexatious pleadings that have unreasonably multiplied these proceedings.

This case is certified to Chief Judge James O. Ellison on the entire record generated as of December 16, 1993, with a recommendation that appropriate sanctions be considered, after

proper notice and a full opportunity to be heard is provided as required by Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987)

It is further recommended that the record as certified first be referred to this court's Committee on Admissions and Grievances for investigation and advisory recommendations regarding the tenor and scope of appropriate action. The committee should recognize the purpose of Rule 11 and § 1927 sanctions is two-fold. One objective is to deter undesirable conduct, and the other is to compensate the victims of litigation abuse. These purposes have some natural antagonism between them. Full compensation of a well-heeled victim who has knowingly engaged in the frey may be unfair to a perpetrator who is not malicious, but so misguided as to mistake reckless accusation for zealous advocacy. I surmise that this may be the situation here.

Consequently, any corrective action should be the minimum necessary to effectively deter future conduct deleterious to the proper functioning of the court. The committee should proceed with due regard for the individual circumstances of the lawyer involved, as directed by the Tenth Circuit in White v. General Motors Corp., 908 F.2d 675, 685 (1990). Due to this court's continuing concern for the wellbeing of Plaintiff's counsel, who is and has been for some time an officer of this court, it is urged that the committee first consider the efficacy of non-punitive, constructive measures, such as peer review and counselling, additional CLE requirements, etc., before recommending additional monetary sanctions or disciplinary action to Chief Judge Ellison.

Plaintiff's counsel may file an appeal within fifteen (15) days from the date this Order is filed, and defendants may respond within fifteen (15) days thereafter. Plaintiff may then file a reply, addressing only new matter within ten (10) days of the filing of defendants' response. No other pleadings are to be filed in this case without specific, prior approval by Chief Judge

James O. Ellison. No application requesting such approval shall exceed a total of two (2) pages in length, or be submitted before the disposition of the pending motion to dismiss (#5).

Dated this 22nd day of December, 1993.

s/ John Leo Wagner

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

[Filed April 13, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

The Court has for consideration Defendants' Motion to Dismiss (docket #5) and Defendant's Motion for Costs and Attorney Fees (docket #28). The Motion for Costs and Attorney Fees will be REFERRED TO THE MAGISTRATE.

Pursuant to Ten Mile Industrial Park, 810 F.2d 1518 (10th Cir. 1987) the Court has reviewed the record and finds that the Tulsa exhibit affords a jurisdictional basis for the suit in this court. Given the nature of the activity (the exhibit) in relation to the lawsuit in conjunction with the anticipated benefit of the exhibit to the Defendants, the Court finds that jurisdiction will lie herein and Defendant's Motion to Dismiss will be DENIED.

ORDERED this 12th day of April, 1994.

s/ James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX H

[Filed October 19, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

Now before the Court is the Plaintiff's Request for Clarification of the Court's Ruling on the Issue of In Personam Jurisdiction (Docket #112). Plaintiff requests that this Court clarify its Order of April 13, 1994 (Docket #86) to establish whether the Court, in that Order, determined that it had jurisdiction over the Defendants, or merely determined that plaintiff had made a prima facie showing of jurisdiction in order to survive the Motion to Dismiss. This distinction is relevant, all parties agree, in order to determine the continuing relevance of discovery requests relating to the jurisdictional issue.

In its April 13, 1994 Order, the Court stated:

> Pursuant to Ten Mile Industrial Park, 810 F.2d 1518 (10th Cir. 1987), the Court has

> reviewed the record and finds that the Tulsa exhibit affords a jurisdictional basis for the suit in this court. Given the nature of the activity (the exhibit) in relation to the lawsuit in conjunction with the anticipated benefit of the exhibit to the Defendants, the Court finds that jurisdiction will lie herein and Defendant's Motion to Dismiss will be DENIED.

By this language, the Court made it clear that it had determined that jurisdiction would lie in this Court. In this instance, the material facts were not in dispute, and the Court applied the law to the facts, without the need to weigh the factual evidence. Plaintiff's Motion to Clarify is denied. The Court notes that, by this ruling, Plaintiff's Request that Magistrate Judge Enter Written Order Setting Forth His August 11, 1993 ruling Denying Plaintiff's Discovery Motions is Moot.

ORDERED this 18th day of October, 1994.

s/ James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX I

[Filed December 30, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

This order pertains to the Motion to Quash Subpoena Served Upon Sona Johnston and Brief in Support (#125),[1] and the Motion for Protective Order and/or to Quash Notice of Deposition of Sona Johnson and Brief in Support (#126). A hearing was conducted on December 29, 1994, where both these motions were granted in part and denied in part.

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Recognizing the legitimate proprietary interests of Ms. Johnson with respect to her scholarship and research, the court hereby enters a protective order restricting the use and dissemination of any documents or information obtained by Plaintiffs from Ms. Johnson or her employer, the Baltimore Museum of Art. Documents, materials, photographs, or information obtained by virtue of the Deposition of Ms. Johnston in this case, or the subpoena served upon the Baltimore Museum of Art in this case are to be used only in conjunction with this case, and are not to be further disseminated, quoted, cited or otherwise used for any other purpose whatsoever, without an order of this court specifically authorizing such further dissemination or use. Further, the deposition in this case is to limited in subject matter to inquiry directly concerning the painting "Summer Hillside", and may not extend to inquiry regarding any other painting. To the extent the subpoena and/or notice require production of documents concerning any painting other than "Summer Hillside", they are quashed.

In accordance with Local Rule 30.1(G), the deposition of Ms. Johnston will be limited to 6 hours in length. Counsel for Ms. Johnston and the Baltimore Museum of Art are cautioned not to direct Ms. Johnston not to answer questions unless such direction is based on a claim of privilege recognized by Oklahoma law.

The deposition of Ms. Johnston is to proceed as scheduled on January 5, 1995, subject to the provisions of this order.

Dated this 30th day of December, 1991.

s/ John Leo Wagner
John Leo Wagner
UNITED STATES MAGISTRATE JUDGE

APPENDIX J

[Filed April 20, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, Deceased,

Plaintiff,

v.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

TRANSCRIPT OF PROCEEDINGS
HELD ON APRIL 13, 1995
BEFORE HON. JOHN LEO WAGNER, Magistrate

APPEARANCES:

For the Plaintiff:

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MS. JOAN GODLOVE
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(918) 744-0201

For the Defendants Richard & Mary Pfeil	MR. LEWIS N. CARTER Doerner, Stuart, Saunders Daniel & Anderson 320 S. Boston, Suite 500 Tulsa, Oklahoma 74103 (918) 582-1211
For the Defendant [in 94-C-711-K] Sona Johnston	MS. CHERYL COOPER Crowe & Dunlevy 321 S. Boston, Suite 500 Tulsa, Oklahoma 74103 (918) 592-9803

MR. BEUSTRING: We would offer as Exhibits 1, 2, and 3 the depositions [of Sona Johnston] . . . .

THE COURT: Is there any objection to the admission of the depositions?

MR. CARTER: No objection, Your Honor.

THE COURT: Okay. Plaintiff's Exhibits No's 1, 2, and 3 will be admitted.

MS. COOPER: Your Honor, we will request that those be placed under seal.

THE COURT: In the event that the protective order is not lifted, that request will be granted.

* * *

THE COURT: Now, these depositions were taken in two different cases pending in this jurisdiction --

MR. BEUSTRING: Yes.

THE COURT: -- for the purpose of advancing that litigation?

MR. BEUSTRING: This litigation. Yes, sir.

THE COURT: This litigation. Why do we need to relieve these depositions of the attendant protective order?

MR. BEUSTRING: Well, it's so broad. It's vague. . . .

* * *

THE COURT: -- you know, I have some reservations about going in there and examining what appears to be about six or eight inches of deposition testimony on a line-by-line basis to try to discern what may be protected, what may not be protected. I have some reluctance to do that --

MR. BEUSTRING: I don't blame you.

THE COURT: -- if you cannot articulate a reason that we need to release the protective order.

MR. BEUSTRING: The reason is --

THE COURT: You know, what use do you need to put these depositions to that we need to relieve the protective order for. If there was another lawsuit pending and we needed it for cross-examination purposes or there was some other purpose that could be demonstrated or need in this litigation to relieve that order, then that exercise might be fruitful and worthwhile. But why do we need to do it now?

MR. BEUSTRING: Well, for one thing, it's putting the burden of proving on us. We've asked them to identify anything in this deposition that deserves to be. . . .

* * *

THE COURT: Well, when we're talking about "burden" here -- the protective order is already in place. The initial burden that the Court required to establish a protective order has already been met by the defendants here. At this point, it is not their burden. It is your burden to show some legitimate purpose or reason to lift the protective order.

I mean, if there's some reason to do it, then certainly that ought to be entertained by the Court. But at this point, we're not talking about the imposition of the protective order,

that has already been done. What I'm looking for is some good reason to lift the protective order.

MR. BEUSTRING: I think the good reason is that there is no reason to keep it. The fears and the statements of counsel without supporting affidavits made to this Court to put it on initially, it was kind of sua sponte put on at that time before the depositions occurred. The reasons for putting it on did not occur. . . .

***

THE COURT: Well, let me hear from Mr. Carter or Ms. Cooper, whoever is going to take the heat on this.

MS. COOPER: Your Honor, as you've stated, we've already met our burden when we moved for the protective order. The plaintiff has not met his. . . .

***

THE COURT: Well, the motion will be granted in part and denied in part. With regard to documents that Mr. Beustring brought into the deposition, either deposition of Ms. Johnston, the protective order will not be interpreted as being so broad as to preclude the use of those documents however Mr. Beustring wants to use them. Certainly in connection with other litigation, and in connection with this litigation. The documents that he brought into the deposition, he is free to use.

With regard to the documents that were produced by Ms. Johnston or the museum, those will remain subject to the protective order, and are not to be used in connection with any other litigation.

With regard to the deposition transcripts, themselves, the transcripts will also remain subject to the Court's protective

order. They will be filed under seal, the originals that have been submitted into evidence here, and are not to be used for any purpose outside of legitimate purposes in connection with this litigation.

Now, the reason for the maintenance of the protective order at this point in time is that Mr. Beustring has not demonstrated any need for the release of that protective order other than a rather vague uncomfortableness that we have a protective order in place. I think that that uncomfortableness was fully justified given the history of this case and given the fact that we have this large number of exhibits attached to and made exhibits to the deposition, that he brought into the deposition. Certainly with regard to the use of those exhibits in connection with other litigation, I think there was a need for clarification of the protective order.

However, with regard to the use of the actual deposition testimony of this witness until such time that there is an actual need to use the transcript in connection with some other piece of litigation, and that can be articulated to the Court, the Court is going to keep the present protective order in place in order to advance this litigation and to continue to protect the legitimate -- what this Court views as legitimate proprietary interests of Ms. Johnston. And that will be the ruling of the Court.

MR. BEUSTRING: Thank you, Your Honor. We have filed a response to pending motions to dismiss and we have an obligation to respond to the pending motion for summary judgment. Responsive pleadings are about that thick, and much of substantial portions of Sona Johnston's depositions are attached and now filed in response, so I don't know how we would protect that now. I mean, we can put the remaining evidence under seal, but we do have that document out there and it has already been filed in response to back up our position.

THE COURT: What is the pleading number, and the Court will simply order those pleadings to also be placed under seal.

[Filed April 21, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

This order pertains to the Motion to Lift Protective Order (Docket #144).[1] A hearing was conducted on April 13, 1995, and oral arguments were heard.

The motion is granted in part and denied in part. The motion is granted with regard to documents which Mr. Beustring brought into either deposition with Miss Sona Johnston.

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

These documents may be used in future depositions. The motion is denied with regard to the documents produced by Miss Johnston or the museum. These documents are not to be used for any purpose outside this case. The motion is denied with regard to deposition transcripts, which will remain subject to the court's protective order and filed under seal and are not to be used for any purpose outside this case. Any portion of the deposition transcripts which have been used in connection with pleadings, including any motions for summary judgment, are to be placed under seal.

Dated this 20th day of April, 1995.

s/ John Leo Wagner
John Leo Wagner
UNITED STATES MAGISTRATE JUDGE

[Filed January 4, 2000]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-5043

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff - Appellant,

v.

RICHARD PFEIL; MARY JO PFEIL,

Defendants - Appellees.

ORDER
Filed January 4, 2000

Before ANDERSON and BRISCOE, Circuit Judges, and KIMBALL,[1] District Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as

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[1] The Honorable Dale A. Kimball, United States District Judge for the District of Utah, sitting by designation.

required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ [illegible]
Deputy Clerk

Magistrate's Act, 28 U.S.C. § 636

(b)(1) Notwithstanding any provision of law to the contrary --

> A judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except . . . . A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Federal Rule of Appellate Procedure 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

> **(2) Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. . . .

Federal Rule of Civil Procedure 26. General Provisions Governing Discovery

(c) Protective Orders. Upon motion . . . by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a . . . person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a

trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . .

Federal Rule of Civil Procedure 36. Requests for Admission

(a) Request for Admission. . . . A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request.

The party who has requested the admissions may move to determine the sufficiency of the answer or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

Federal Rule of Civil Procedure 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions [pre-1993 amendment]

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(2) Motion. If . . . a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34 fails to respond that inspection will be permitted as requested or fails

to permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request.

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Federal Rule of Civil Procedure 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions [as amended in 1993]

(a) Motion for Order Compelling Disclosure or Discovery. . . .

(4) Expenses and Sanctions.

(B) If the motion is denied, the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court . . . may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties . . . in a just manner.

APPENDIX M

Federal Rule of Civil Procedure 72. Magistrate Judges; Pretrial Orders

> **(a) Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order . . . . The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.